Filed 3/26/09 In re Skyla M. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re SKYLA M. et al., Persons Coming Under the Juvenile Court Law.	B205231 (Los Angeles County Super. Ct. No. CK59764)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. DANIELLE R. et al., Defendants and Appellants.	

APPEAL from orders of the Superior Court of Los Angeles County, Debra Losnick, Commissioner. Reversed.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant and Appellant Joshua S.

Michael A. Salazar, under appointment by the Court of Appeal, for Defendant and Appellant Danielle R.

No appearance for Plaintiff and Respondent.

Merrill Lee Toole, under appointment by the Court of Appeal, for Minors.

INTRODUCTION

Joshua S., father of Gabriel S. and Danielle R., mother of Gabriel and Skyla M., separately appeal from the order of the juvenile court terminating their parental rights. (Welf. & Inst. Code, § 366.26.)[1] Previously, father filed a petition for extraordinary writ review of the juvenile court's order terminating reunification services for him and setting the hearing under section 366.26. (Cal. Rules of Court, rule 8.452.) We granted the writ petition and ordered the court to extend father's reunification period an additional six months.[2] In the ensuing year, neither the Department of Children and Family Services (the Department) nor the parents have complied with the juvenile court's disposition orders. Meanwhile, the children have been in foster care with Gabriel's grandmother for 31 months, nearly seven months beyond the outside limit for reunification services. In their appeals, father and mother argue there is no evidence that the Department provided adequate reunification services or visitation and so the juvenile court could not terminate parental rights. The Department does not oppose reversal of the court's order, effectively conceding it did not provide adequate services. However, an attorney appointed for the children has filed a brief in support of the court's order. We conclude that the record contains no evidence to support the trial court's finding that adequate reunification services were provided with the result it could not terminate services. (§ 366.21, subd. (g)(1).) Because reasonable services were not provided despite the court's order calling for reunification, the court could not terminate parental rights. (§ 366.26, subd. (c)(2)(A).) Accordingly, we reverse the order.

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[1] All further statutory references are to the Welfare and Institutions Code.

[2] The court grants the parents' requests filed on April 15, 2008 and May 6, 2008 to take judicial notice of our prior opinion in this case.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The family history*

In June 2005, when Gabriel was 14 months old and Skyla was 2 and a half years old, the Department detained them because mother had stabbed the maternal grandmother in the back. Mother was arrested. Father was already incarcerated at the time. The children were placed with their respective paternal grandmothers.

Father's criminal history, related to substance abuse and gang affiliation, includes burglary, battery, trespass, and vandalism. Mother was described as a "hard core drug addict," having abused drugs since the age of 16, sometimes doing so in the children's presence. Mother had been exhibiting psychotic behavior for two to three years with episodes of paranoia and violence. Mother was arrested earlier the year of the detention for hitting the maternal grandfather in the mouth. Together, mother and father have a history of domestic violence.

In November 2005, the children were placed together with Gabriel's paternal grandparents.

After the juvenile court sustained a petition under section 300, subdivisions (a) and (b), it devised a disposition plan that would remain unchanged throughout this dependency. Specifically, the court ordered both parents to undergo drug counseling, with random, weekly, on demand testing, domestic violence counseling, parent education classes, and individual counseling to address case issues, including anger management. The court specifically directed mother to undergo a mental health evaluation and to take all prescribed medication. The court awarded monitored visits for both parents to occur after father met with the Department.

2. *November 2005 to September 2006*

The Department sent father two "contact" letters. Father indicated he was hesitant to complete a drug program or to test because, he insisted, he was not a drug user. Father was able to visit Gabriel because the paternal grandparents "intermittently brought" Gabriel to jail for visits. When he was released in December 2005, father reported his whereabouts to the Department and visited Gabriel. Told he would have to submit to

drug testing, father indicated he would " 'probably' " produce a positive result for marijuana. Father was re-arrested a month later.

Mother was sent to Patton State Hospital when the children were detained, but was returned to jail in January 2006 after being found competent to stand trial for attempted murder. In all, mother was incarcerated in four different locations during the six-month period. The Department sent mother five letters between August 31, 2005 and March 31, 2006 informing her that the children were doing well in their home, and listing the activities that mother "need[ed] to be involved in which will facilitate reunification with your children. . . ." The letter asked mother to talk with the staff or chaplain about programs offered in prison and to call the social worker collect or to write. Mother contacted the Department in October 2005 requesting information about her children and wrote one letter to the juvenile court requesting a certain placement for the children. Otherwise, the record reflects no effort on mother's part to contact the Department or to comply with her case plan. The maternal grandmother took the children to visit mother in jail approximately once a month with the exception of March 2006, when mother's disruptive behavior at the institution prevented visits. Also, mother called the caregivers' home on a weekly basis to talk about the children's wellbeing.

At the six-month hearing (§ 366.21, subd. (e)) in May 2006, the juvenile court found that "[r]easonable services [were] provided," and terminated reunification. Father, who had been present at the hearing received notification of his right to file a writ petition. The court sent mother's writ notice by first class mail apparently to the county jail, despite knowledge that mother had been transferred to state prison. Father filed a writ petition; mother did not.

As noted, we granted father's writ petition. We held that the juvenile court's finding that reasonable reunification services had been provided was error. In particular, we discerned no evidence that the Department "made the necessary effort to provide services to father." Despite knowing where father was housed, the Department made no attempt to ascertain what services were available in prison or elsewhere. Father volunteered the information that the prison's parenting classes were full. Otherwise, the

Department did nothing to arrange for services. Until specifically ordered by the court to interview father, the Department's effort to contact him was "lackluster at best." We reversed the order terminating services and ordered the juvenile court to extend reunification period for an addition six months.

During the time that the writ proceeding was pending in this court, the Department recommended to the juvenile court that Gabriel's paternal grandparents become the children's legal guardians.

3. *September 2006 to May 2007*

Returning to the juvenile court, in September 2006, and following our directive, the juvenile court extended reunification services for six additional months for father and Gabriel. The court confirmed that father was to have ongoing monitored visitation with Gabriel. However, with respect to Skyla and mother, the court set the matter for a contested section 366.26 hearing after only six months of services. (§ 366.21, subd. (e).) In December 2006, as Skyla's permanent plan (§ 366.26), the court appointed Gabriel's paternal grandparents legal guardians of Skyla.

In the ensuing six-month period, the Department experienced difficulty locating father. In September 2006, the social worker asked the paternal grandparents to have father call the Department because father had no telephone or residence. During a visit with the children in October 2006, the social worker learned that father had been re-arrested. The Department's inmate check located father in the Men's Central Jail, but by November, father had been moved to a facility in Lancaster, California. The social worker sent father a letter informing him that he could call the Department collect, but did not hear from father. Father was moved again, and in January 2007, the Department set him a letter at the new facility reminding him of the option to call the social worker collect. Father never contacted the Department nor informed the social worker about his whereabouts. The paternal grandmother explained that while in county jail, father was attending court-ordered programs. However, the state facility where he was housed did not offer programs for father. Father was expected to be released in April 2007.

By the time of the 12-month hearing (§ 366.21, subd. (f)) held at the end of May 2007, father had been paroled. The juvenile court found neither parent was in compliance with the case plan and that Gabriel could not be returned to father. The court terminated reunification services for father. Mother chose this hearing to request, for the first time since their detention, that the children visit her in jail. The court set a section 366.26 hearing for Gabriel and a hearing to review the permanent plan for Skyla.

4. *2007*

In the summer of 2007, Gabriel's paternal grandparents, who are also Skyla's guardians, decided they wanted to adopt both children. Father had been re-arrested by this time and so both parents were incarcerated by late 2007. The Department reported that there had been no visits except that maternal grandmother had taken Skyla to visit mother.

At the section 366.26 hearing held in January 2008, the juvenile court found that because both parents were incarcerated, they could not show the parental-relationship exception to termination of parental rights. (§ 366.26, subd. (c)(1)(B)(i).) The court ordered that parental rights be terminated and that the children be placed for adoption. Both parents appealed.

CONTENTIONS

Father contends that the juvenile court erred in terminating his parental rights because, notwithstanding this court's orders extending reunification an additional six months, the Department did not thereafter provide additional services or arrange for Gabriel to visit father in prison.

Mother contends that the juvenile court failed to inform her of her right to extraordinary writ review, and erred in terminating parental rights because of the failure of the Department to ensure visitation.

DISCUSSION

1. *The juvenile court did not notify mother of her right to contest the provision of services by petition for extraordinary writ and so she may challenge the order terminating reunification services in her appeal from the order terminating parental rights.*

The children's counsel concedes, and the Department does not challenge mother's contention, that mother was not given proper notice of her right to challenge the termination of services by writ petition. We have reviewed the record and conclude that the juvenile court never gave mother proper notification of her right to petition for extraordinary writ review. (§ 366.26, subd. (*l*)(3)(A); Cal. Rules of Court, rule 5.695(f)(18).)[3] Therefore, mother is entitled to challenge the order terminating reunification services for her in her appeal from the order at the section 366.26 hearing terminating her parental rights. (§ 366.26, subd. (*l*)(1); *Joyce G. v. Superior Court* (1995) 38 Cal.App.4th 1501, 1507.)

2. *The failure of the Department to provide services and especially visitation mandates reversal of the order terminating parental rights.*

Both parents challenge the juvenile court's finding that the Department provided reasonable services to them. Mother contends that the Department failed to provide reasonable services and visitation during the reunification period, and thereafter provided no visitation. Father contends that the Department made no effort to provide services or visitation after our opinion castigating the Department for its lackluster performance in the first six months of the dependency. Both parents contend that the Department's

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[3] California Rules of Court, rule 5.695(f)(18) reads: "When the court orders a hearing under section 366.26, the court must advise orally all parties present, and by first-class mail for parties not present, that if the party wishes to preserve any right to review on appeal of the order setting the hearing under section 366.26, the party must seek an extraordinary writ by filing a Notice of Intent to File Writ Petition and Request for Record . . . ." (Italics omitted.)

failure to provide visitation violated their right to due process because it deprived the parents of the ability to establish the parental relationship exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)).

The Department has admirably decided not to oppose reversal of the order terminating parental rights and the institution of six more months of services. The Department acknowledges that the record does not show that it provided father with reasonable reunification services or that it facilitated visitation between father and Gabriel. Without admitting it committed the errors mother asserts in her appeal, the Department concedes that the juvenile court's order terminating her parental rights was also error.

"In reviewing the reasonableness of the services provided, this court must view the evidence in a light most favorable to the respondent. We must indulge in all reasonable and legitimate inferences to uphold the judgment. [Citation.] 'If there is any substantial evidence to support the findings of a juvenile court, a reviewing court is without power to weigh or evaluate the findings.' [Citation.]" (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1361 -1362.)

As we explained in *In re Ronell A.*, "The adequacy of . . . the department's efforts are judged according to the circumstances of each case. [Citation.] With respect to the plan itself, '[e]ach reunification plan must be appropriate to the particular individual and based on the unique facts of that individual. [Citations.]' [Citation.] 'The effort must be made to provide suitable services, in spite of the difficulties of doing so or the prospects of success. [Citation.]' [Citation.] '[T]he focus of reunification services is to remedy those problems which led to the removal of the children. . . . .' [Citation.] '[T]he record should show that the [department] identified the problems leading to the loss of custody, offered services designed to remedy those problems, maintained reasonable contact with the [parent] during the course of the service plan, and made reasonable efforts to assist the [parent when] compliance proved difficult . . . .' [Citation.]" (*In re Ronell A., supra,* 44 Cal.App.4th at p. 1362.)

Our earlier opinion in this case explained, despite father's desire to visit with his child and the court's order for visitation, that the "record contain[ed] absolutely no evidence that the Department arranged for, facilitated, or monitored a single visit for father and Gabriel. To the degree that father was able to visit his son, it was thanks to the effort of his family, not the Department. The record simply does not support the County Counsel's assertion 'that the visitation *arrangement* was for the paternal grandparents to take G[.] to visit [father] in jail." (*J. B. S. v. Superior Court* (Aug. 29, 2006, B191199) [nonpub. opn.].) "[A]lthough ' "incarcerated parents . . . suffer obvious obstacles to visitation[,] . . . the law is clear that reasonable services, most particularly visitation, must be provided." [Citation.]' [Citations.]" (*J. B. S. v. Superior Court, supra*, B191199.)

Notwithstanding our obvious disapproval of the Department's conduct during the first six months of reunification, the Department made no more of an effort in the succeeding year. Even in a light most favorable to the Department, the record here shows that it asked the paternal grandparents about father's whereabouts twice and sent two letters to father in six months. Rather than to provide services, the Department simply relied on father and his family to ascertain and inform the social worker about services offered in jail.

Likewise, the Department's own status review reports show that its provision of services to mother was anemic. The Department did little other than to send monthly letters to mother through March 2006, reminding her of the case plan obligation and that suggesting that she speak to "the staff, counselor or chaplain, about what programs are offered there" and that if she needed help, she could call the social worker collect. The Department has a responsibility to make a " ' " 'good faith effort' " ' to provide reasonable services responsive to the unique needs of each family." (*Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1010.) The Department never contacted any institution to determine the availability of services to either parent. (*Id*. at p. 1013.) There is no mention in the record that the Department followed up on the juvenile court's specific directive that mother undergo a mental health evaluation and take all prescribed medication, clearly a core component of the case plan.

What is more troubling is that throughout this dependency, the Department has shirked its responsibility to arrange for visits, leaving to the families the tasks of arranging for and transporting the children. The failure to provide for visitation for an incarcerated parent is unreasonable where the court has ordered visitation, the prison is not excessively distant, and the inmate parent is allowed visits. *(In re Ronell A., supra,* 44 Cal.App.4th at p. 1364.) The juvenile court ordered visitation; we confirmed that order in our previous opinion; both parents were housed in Los Angeles County where the children also reside; and the parents have been receiving visits, and mother has been telephoning the children. Therefore, there was no justification for the failure to facilitate visits.

Certainly, the parents bear their own portion of responsibility here. Both parents were difficult to locate at times because they were moving in and out of, or between prisons. While the record lacks evidence that the Department identified programs that might be available to the parents at their prisons during the course of the dependency, the parents made little if any effort to contact the Department or to inform the social workers of their whereabouts or of the programs available in prison. Both parents were represented by counsel and yet never alerted the juvenile court to the lack of services or visitation, with the exception of father's writ petition. The prospects of reunifying are dim. Still, both parents have expressed their desire to reunify and have been visiting the children thanks to the grandparents, not the Department. And, mother has called the children weekly. While it is true that " 'the court must consider . . . *whether the parent has "cooperated and availed himself or herself of services provided.*" ' [Citation.]" (*In re Ronell A., supra*, 44 Cal.App.4th at p. 1365), it is equally true that the parents are "not required to complain about the lack of reunification services as a prerequisite to the department fulfilling its statutory obligations. [Citations.]" (*Mark N. v. Superior Court, supra,* 60 Cal.App.4th at p. 1014, citing § 361.5, subds. (a) & (e)(1).) "Reunification services must be offered to an incarcerated parent 'unless the court determines by clear and convincing evidence, those services would be detrimental to the minor.' [Citation.]" (*In re Precious J*. (1996) 42 Cal.App.4th 1463, 1472, citing § 361.5, subd. (e)(1).) The

court specifically found that reunification services were warranted and never changed that ruling. Nor did the Department ever request an order denying the parents services. Once ordered, services must be provided despite the difficulty in doing so. (*In Re Ronell A.*, *supra*, 44 Cal.App.4th at p. 1362, quoting from *In re Dino E*. (1992) 6 Cal.App.4th 1768, 1777.) Reunification is not a competition between the Department and parents to see who can participate least until the court terminates services and sets the section 366.26 hearing.

The record simply does not support the juvenile court's finding that reasonable services, and especially visitation, have been provided to the parents. (§ 366.21, subd. (g)(1).)[4] Therefore, the court was precluded from setting the section 366.26 hearing. (*Ibid*.; see also § 366.22, subd. (b).) More important, section 366.26, subdivision (c)(2)(A) *precludes* the juvenile court from terminating parental rights if "[a]t each hearing at which the court was required to consider reasonable efforts or services, the court has found that . . . reasonable services were not offered or provided." On the facts of this case, because the record reveals the Department never offered or provided reasonable reunification services to the parents, the juvenile court cannot terminate parental rights. (§ 366.22, subd. (c)(2)(A).) Although adoption has become the permanent plan, the court is barred by section 366.26, subdivision (c)(2)(A) from implementing that plan. (*Mark N. v. Superior Court, supra,* 60 Cal.App.4th at p. 1016.) Such is the tragedy of this dependency that mistakes have been made at every turn.

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[4] Section 366.21, subdivision (g)(1) reads in relevant part: "The court may not order that a hearing pursuant to Section 366.26 be held unless there is clear and convincing evidence that reasonable services have been provided or offered to the parent or legal guardian."

Section 366.22, subdivision (b) reads in pertinent part: "The court shall continue the case only if it finds that there is a substantial probability . . . that reasonable services have not been provided to the parent or legal guardian. . . . [¶] . . . [¶] . . . The court may not order that a hearing pursuant to Section 366.26 be held unless there is clear and convincing evidence that reasonable services have been provided or offered to the parent or legal guardian."

The question is where to go from here. The children's counsel contends that we should affirm the juvenile court's order terminating parental rights because this dependency far exceeds the 18 months allotted by the Legislature and the children have a need for, and it is in their best interests to have, finality. (§ 361.5, subd. (a)(2).) However, the children have been in the same, stable, nurturing placement since the beginning of this case. While we agree that this dependency has endured far too long, mother was only allowed six months of services and father twelve months. And, the focus only shifts to the best interests of the children after reunification has been terminated. (*In re Marilyn H*. (1993) 5 Cal.4th 295, 309.)

"[T]he 18-month review hearing constitutes a critical juncture at which 'the court must return children to their parents and thereby achieve the goal of family preservation or terminate services and proceed to devising a permanent plan for the children.' [Citations.]" (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 596, fn. omitted.) The 18-month hearing is when the juvenile court makes " 'critical' decisions concerning parental rights." (*Mark N. v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1015.)

Thus, section 366.22 directs the juvenile court to terminate reunification services and send the case to the section 366.26 hearing at the 18-month mark. (§ 366.22, subd. (a); see also § 366.21, subd. (g)(1).) That section gives the juvenile court the option of continuing reunification services if it determines that reasonable services were not offered or provided to the parent. (See also § 366.21, subd. (g)(1).) However, as of 2009, section 366.22 specifies that the permanency review hearing not be held more than 24 months after the date the child was originally removed from the parents' custody. (§ 366.22, subd. (b).) This case is already three years old. Meanwhile, section 366.26, subdivision (c)(2)(A) bars the juvenile court from terminating the parents' rights because there is no evidence the Department offered or provided reasonable services as ordered and so adoption in this case is not a viable permanent plan at this point. Accordingly, the juvenile court here is faced with the problem of a case that has far exceeds the 24-month date envisioned by the Legislature in section 366.22 while the Department has made no effort to offer or provide reasonable services, thus preventing the court from terminating

services and setting a section 366.26 hearing. (§ 366.21, subd. (g)(1); § 366.22, subd. (b).)

"Courts of Appeal have held the Legislature never intended a strict enforcement of the 18-month limit to override all other concerns including preservation of the family when appropriate. [Citations.]" (*Mark N. v. Superior Court, supra*, 60 Cal.App.4th at p. 1016; *Katie V. v. Superior Court, supra,* 130 Cal.App.4th at p. 596, fn. 6.) "There is no question the Legislature, by adopting section 366.22, intended to hasten the development and implementation of a permanent plan for children who previously spent endless years in foster care limbo." (*In re Elizabeth R*. (1995) 35 Cal.App.4th 1774, 1795-1796.) But, "section 366.22 was not designed to torpedo family preservation." (*Id*. at p. 1796.) Hence, appellate courts have generally held that the "juvenile court has discretion to continue an 18-month hearing pursuant to section 352 when, as here, no reasonable reunification services were ever been offered or provided to a parent. [Citations.] The juvenile court may do so on its own motion. [Citations.]" (*Mark N. v. Superior Court, supra*, 60 Cal.App.4th at pp. 1016-1017, fn. omitted, citing *In re Elizabeth R., supra*, 35 Cal.App.4th at pp. 1795 -1796, *In re David D.* (1994) 28 Cal.App.4th 941, *In re Daniel G*. (1994) 25 Cal.App.4th 1205 & *In re Dino E., supra*, 6 Cal.App.4th 1768.)[5] While *Mark N*. and its antecedents were determined at the 18-month point and preceded amendments to section 366.22 that established the 24-month date as the outside limit, here neither parent was afforded 18 months of services. Father was allowed 12 months and mother only 6 months of reunification. Under the unique circumstances of this case, following the lead of *Mark N.*, the juvenile court here should

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[5] Section 352, subdivision (a) reads: "Upon request of counsel for the parent, guardian, minor, or petitioner, the court may continue any hearing under this chapter beyond the time limit within which the hearing is otherwise required to be held, provided that no continuance shall be granted that is contrary to the interest of the minor. In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements."

exercise its discretion and determine whether to hold a permanency planning hearing (§ 366.22) by considering under section 352: "the failure to offer or provide reasonable reunification services; the likelihood of success of further reunification services; whether [children's] need for a prompt resolution of [their] dependency status outweighs any benefit from further reunification services; and any other relevant factors the parties may bring to the court's attention. [Citation.]" (*Mark N. v. Superior Court, supra,* 60 Cal.App.4th at p. 1017.) "Alternatively, as the children have suggested, on remand, if [the parents are] then incarcerated the court may determine pursuant to section 361.5, subdivision (e)(1)" whether, upon showing of clear and convincing evidence, that providing reunification services would be detrimental to the children. (*Mark N. v. Superior Court, supra,* at p. 1018.) If the juvenile court makes finding under section 361.5, subdivision (e)(1) that reunification services would be detrimental to the children, then the court may proceed with the section 366.26 hearing.

As the result of our conclusions here, we need not address mother's additional contentions.

DISPOSITION

The orders terminating parental rights and terminating reunification services are reversed in accordance with the views expressed in this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.